

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL ROSS)	
Claimant)	
VS.)	
)	
SPIRIT AEROSYSTEMS, INC.)	
Respondent)	Docket No. 1,047,372
AND)	
)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Claimant requested review of Special Administrative Law Judge (SALJ) John C. Nodgaard's February 22, 2013 Award. The Board heard oral argument on June 21, 2013. Roger A. Riedmiller, of Wichita, Kansas, appeared for claimant. Eric K. Kuhn, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

SALJ Nodgaard found claimant suffered no permanent impairment as a result of his alleged injuries and was not in need of any permanent restrictions. SALJ Nodgaard denied claimant's request for benefits.

The Board has considered the record and adopted the Award's stipulations, with the exception of noting that the listed temporary total disability rate in stipulation no. 7 should be \$452.39 instead of \$452.79. The parties also indicated at oral argument that the stipulation regarding records sent to Paul S. Stein, M.D., which contains an approximate one inch stack of medical records, was only intended to illustrate what records were sent to such physician for his court-ordered evaluation of claimant. The parties specifically noted that the Board should not consider any of the medical opinions contained within such records unless the medical providers provided testimony in this case. Additionally, the parties agreed that the Board may consult and consider the *AMA Guides*¹ (hereafter *Guides*) in rendering a decision.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

ISSUE

Claimant argues that he suffered a permanent partial disability of at least 5% to the body as a whole and is entitled to a \$100,000 permanent partial general (work) disability award. Respondent maintains that SALJ Nodgaard's Award should be affirmed.

The only issue concerns the nature and extent of claimant's injury and disability.

FINDINGS OF FACT

Claimant worked for respondent as a sheet metal assembly mechanic. His job duties involved repetitively bucking rivets, lifting panels and drilling holes.

On or about July 8, 2009, claimant began experiencing symptoms in his neck and low back after carrying heavy materials. He reported the injury to his supervisor and was referred to NovaCare, where he was prescribed physical therapy from July 2009 to October 2009. Claimant was referred to John Estivo, D.O., a board certified orthopedic surgeon.

Dr. Estivo initially treated claimant on August 10 and a second time on August 27, 2009. Claimant complained of persistent cervical and lumbar pain, but denied symptoms radiating into his upper or lower extremities. Testing for carpal tunnel syndrome was negative. Dr. Estivo diagnosed claimant with cervical and lumbar strains.

Claimant called Dr. Estivo's office at 4:45 p.m. on September 1, 2009, stating he could not move his neck. He was told he could see Dr. Estivo on September 2, 2009, but did not show up the next day. Claimant also failed to attend a September 10, 2009 appointment. When he showed up for his September 16, 2009 appointment, claimant was holding his left shoulder to his left ear. Dr. Estivo's report states, "It is difficult to explain why he claims to be having the degree of muscle spasm he is having along the left side of the cervical spine. It does appear to be somewhat exaggerated. He does appear to voluntarily be holding his neck in that position."²

After Dr. Estivo could find no objective findings on examination and nothing significant on lumbar and cervical spine MRIs, he concluded claimant was exaggerating his symptoms. In his October 1, 2009 report, Dr. Estivo noted claimant was no longer voluntarily holding his left ear to his shoulder. Dr. Estivo's report states, "I do feel that this patient seems to be somewhat magnifying his symptoms. He is demonstrating some inconsistencies on his examination today."³

² Estivo Depo., Ex. 2 at 44.

³ *Id.*, Ex. 2 at 42.

On October 14, 2009, claimant was evaluated at his attorney's request by Pedro Murati, M.D., who is board certified in physical medicine and rehabilitation, and certified as an independent medical examiner. Claimant's chief complaints concerned his neck, low back and lack of sleep. Dr. Murati diagnosed bilateral carpal tunnel syndrome, low back pain with signs and symptoms of radiculopathy, myofascial pain syndrome of the left shoulder girdle extending into the cervical and thoracic paraspinals and left SI joint dysfunction. Dr. Murati recommended conservative treatment and provided restrictions.

In his October 19, 2009 report, Dr. Estivo noted claimant was self-limiting on range of motion during specific testing, but would have better range of motion when distracted. Dr. Estivo noted claimant appeared to be "quite comfortable"⁴ despite pain complaints. Claimant was described by Dr. Estivo as "argumentative" and "dramatic."⁵ While Dr. Estivo could not identify objective findings to explain claimant's subjective complaints, he gave claimant the "benefit of the doubt" in assessing "soft tissue strain to the cervical and lumbar spines to a mild degree."⁶ Dr. Estivo stated, "He has been told that at any time if he feels he wants to get another opinion, he can certainly do that. I do feel that this patient is malingering. I do feel that he is exaggerating his symptoms. I cannot find anything objective to explain his subjective complaints."⁷

Claimant did not return to Dr. Estivo for a follow-up visit on November 5, 2009.

Claimant was dissatisfied with Dr. Estivo, so respondent provided a change of physician to Bernard Poole, M.D., a board certified orthopedic surgeon. Dr. Poole initially evaluated claimant on November 24, 2009, for left side neck pain, numbness and weakness in both arms, hands and fingers and mild left low back pain with no radiculopathy. While claimant had various symptoms, Dr. Poole's examination revealed no abnormal findings. Dr. Poole ordered EMG/NCT studies that were essentially normal.

On December 22, 2009, Dr. Poole recorded that it was his opinion that claimant "does not have objective evidence of any measurable orthopedic problems in the cervical spine, in the lumbar spine, in the upper limbs and in the perineum and lower limbs" and further noted claimant "does not have measurable disability attributable to this alleged work injury."⁸ Dr. Poole released claimant to return to work with no restrictions.

⁴ *Id.*, Ex. 2 at 40.

⁵ *Id.*, Ex. 2 at 39.

⁶ *Id.*, Ex. 2 at 39.

⁷ *Id.*, Ex. 2 at 38.

⁸ Poole Depo., Ex. 1 at 3.

Claimant returned to Dr. Poole on January 21, 2010. Dr. Poole again conducted a physical examination, but observed no abnormal physical findings, despite claimant's complaints. Claimant advised Dr. Poole that he would find another doctor.

Claimant testified that his supervisor was yelling at him and threatening to take his job based on work performance. Claimant complained about such treatment, which he viewed as harassment, to human resources. Respondent had claimant undergo a mental evaluation on February 22, 2010, apparently because he seemed angry.⁹ On February 27, 2010, respondent terminated claimant's employment based on work place violence concerns. Claimant disagreed with respondent's rationale for his termination.

Claimant testified at a preliminary hearing that Dr. Poole provided no treatment. On March 5, 2010, Administrative Law Judge Nelsonna Potts Barnes issued an order that claimant's medical treatment with Dr. Poole was unsatisfactory. Judge Barnes ruled that claimant could select another physician from a list of three physicians respondent had previously given claimant. From the list, claimant selected to obtain authorized medical treatment from Sandra Barrett, M.D., who is board certified in physical medicine and rehabilitation.

On March 16, 2010, Judge Barnes ordered an independent medical evaluation with Rosalynn Innis, M.D., a psychiatrist.

Dr. Barrett initially treated claimant on March 31, 2010, for complaints of chronic neck and low back pain. Claimant initially reported that his pain was a 10 on a 0-10 pain scale. While claimant had subjective complaints of pain and tenderness, Dr. Barrett's examination was basically normal.

Dr. Barrett performed nerve conduction studies on April 1, 2010, which were essentially normal. Dr. Barrett reviewed the prior MRIs and noted the lumbar MRI was unremarkable and the cervical MRI showed minimal degenerative disc disease. Dr. Barrett diagnosed claimant with cervical and lumbar sprains "without any definitive findings on MRI or on nerve conduction study."¹⁰

On May 10, 2010, claimant was evaluated by Dr. Innis, who diagnosed him with adjustment disorder with depressed mood, which she opined was related to his work injury and loss of employment. Dr. Innis suggested claimant continue with Cymbalta and Ambien, which claimant was already obtaining through his primary care physician, and obtain therapy.

⁹ See Moeller Depo., Ex. 2 (Sep. 9, 2010 interview at 11).

¹⁰ Barrett Depo., Ex. 2 at 3.

Dr. Barrett released claimant at maximum medical improvement and released him on a return as needed basis on May 21, 2010.

On July 8, 2010, Administrative Law Judge Barnes issued an Order for psychological treatment and temporary total disability benefits from April 14, 2010 and continuing to May 21, 2010. Respondent was ordered to provide claimant a list of three qualified medical providers from which he could select authorized psychological treatment.

Claimant was referred to Theodore Moeller, Ph.D., a clinical psychologist, for treatment of depression as a result of his loss of employment. Dr. Moeller started treating claimant on September 9, 2010, for major depression with severe psychotic features and dysthymic disorder. Dr. Moeller's September 13, 2010 report stated, "It would be inappropriate and premature—although relatively easy to dismiss this man's psychological testing as a malingered result of a disgruntled employee who feels he has been inappropriately terminated."¹¹ Dr. Moeller opined claimant's work injury made his depression worse. Dr. Moeller diagnosed claimant with major depression, recurrent, severe with psychotic features and probable concurrent dysthymic disorder, with the need to rule out somatoform disorder and malingering.

Dr. Moeller referred claimant to physician assistants for evaluation and prescription of anti-depressant medication. Dr. Moeller also encouraged claimant to apply for social security disability benefits.

Dr. Moeller's treatment records demonstrate that he was concerned about claimant and had numerous suggestions relative to claimant finding a job and obtaining assistance. Further, Dr. Moeller observed that claimant was doing nothing to better his situation. Dr. Moeller had claimant undergo additional testing, consisting of the MMPI-2 and SIMS test.

Dr. Moeller's December 9, 2010 report states that claimant's MMPI-2 and SIMS testing "strongly indicated the only interpretation would be one of malingering."¹² Dr. Moeller's December 13, 2010 report indicated claimant was at maximum medical improvement and "the exit diagnostics (MMPI-2-RF and SIMS) are both positive for indications of malingering. The only indication of lingering symptoms is his self-report, which is questionable."¹³ Dr. Moeller opined claimant had no permanent psychological impairment attributable to a work injury. Based on his evaluations of claimant over the prior months, Dr. Moeller diagnosed claimant with malingering, major depression and probable concurrent dysthymic disorder.

¹¹ Moeller Depo., Ex. 2 (Sep. 13, 2010 Psychological Evaluation at 15).

¹² *Id.*, Ex. 2 (Dec. 9, 2010 Progress Note at 1).

¹³ *Id.*, Ex. 2 (Dec. 13, 2010 Progress Note).

On January 27, 2011, claimant returned to Dr. Murati at his attorney's request. Claimant complained of neck pain, lower back pain with radiculopathy, and trouble sitting and standing. Dr. Murati diagnosed myofascial pain syndrome of the left shoulder girdle extending into the cervical paraspinals, bilateral carpal tunnel syndrome, left SI joint dysfunction, and low back pain with signs and symptoms of radiculopathy. Dr. Murati issued a 24% whole person impairment based on the *Guides*, as follows:

- for right carpal tunnel syndrome, a 10% right upper extremity impairment (which converts to a 6% whole person impairment);
- for left carpal tunnel syndrome, a 10% left upper extremity impairment (which converts to a 6% whole person impairment);
- for myofascial pain syndrome affecting the cervical paraspinals, a 5% whole person impairment based on DRE Cervicothoracic Category II; and
- for low back pain with signs and symptoms of radiculopathy, a 10% whole person impairment based on DRE Lumbosacral Category III.

Dr. Murati provided permanent restrictions that generally limited claimant to light duty work. Dr. Murati later reviewed a task list provided by Jerry Hardin¹⁴ and opined that claimant could no longer perform 38 out of 45 tasks for an 84.4% task loss.

On May 11, 2011, Dr. Estivo again evaluated claimant at respondent's request. Claimant complained of intermittent back pain and minimal neck pain, but denied any symptoms in his upper or lower extremities. Dr. Estivo's examination showed that claimant's spine, and upper and lower extremities were completely normal. Dr. Estivo concluded that claimant's symptoms had resolved. Dr. Estivo issued a 0% impairment pursuant to the *Guides* and determined claimant was not in need of any restrictions.

Dr. Estivo acknowledged that while he was treating claimant, he had concerns about claimant exaggerating and magnifying his symptoms, but nonetheless provided treatment. Dr. Estivo testified that despite his concerns, he tried to give claimant the benefit of the doubt.¹⁵ He also stated that he would have continued to be the authorized treating physician and treated claimant if medical treatment had not been switched to Dr. Poole.

On April 13, 2011, Judge Barnes ordered a neutral evaluation with Paul S. Stein, M.D., who evaluated claimant on October 10, 2011. Dr. Stein determined that claimant's

¹⁴ Claimant was interviewed by Mr. Hardin, a human resources consultant, on September 12, 2011, for a vocational assessment.

¹⁵ Estivo Depo. at 39; see also pp. 21-22.

only objective findings were a decreased ankle reflex on the right and an absent ankle reflex on the left, which Dr. Stein noted were not significant. Claimant complained of persistent neck and lower back pain, despite having not worked for months, and that his back pain was as high as a 10 on a 0-10 pain scale in the prior month. Dr. Stein believed claimant's reported symptoms were disproportionate to the physical findings, as well as the cervical and lumbar MRI scans, but noted no overt symptom magnification. Dr. Stein diagnosed claimant with a neck and back strain with likely subsequent overlay of psychological factors contributing to his complaints of pain.

It was Dr. Stein's opinion that claimant had no permanent impairment with respect to his neck based on DRE Cervicothoracic Category I. With respect to the low back, Dr. Stein provided a 5% impairment to the body as a whole based on DRE Lumbosacral Category II in the *Guides*. Dr. Stein indicated that he used his own judgment to place claimant in Category II, as claimant fit between DRE Lumbosacral Categories I and II. Dr. Stein noted there was no evidence of structural injury to the lower back that required any permanent restrictions. Dr. Stein also did not assign claimant restrictions because there was symptom magnification as compared to testing.¹⁶

At the March 21, 2012 regular hearing, claimant testified that he has "some back pain," intermittent left leg numbness and tingling, neck pain once or twice a week, depending on the weather, and sporadic upper extremity symptoms.¹⁷

Dr. Murati testified on April 16, 2012. Dr. Murati acknowledged that claimant did not make any complaints of wrist problems nor did he have any records to show claimant received treatment for bilateral carpal tunnel syndrome. With regard to claimant's low back complaints, Dr. Murati testified that while diagnostic studies were negative, he found objective findings during his examination. When questioned regarding this, Dr. Murati testified:

- Q. By using the phrase signs and symptoms of radiculopathy I take that that that is based upon suggestive information coming from [claimant]; is that correct?
- A. Well, the symptoms would be – the symptoms would be subjective. But the signs are not. This person is missing his bilateral – his bilateral ankle jerks and hamstring reflexes.

...

¹⁶ Stein Depo. at 45.

¹⁷ R.H. Trans. at 13-17, 22.

- Q. Now, how can he have objective signs and symptoms of radiculopathy in your opinion but have negative findings on the EMG/NCT?
- A. I don't know. I wasn't there when Dr. Barrett did the study. So I couldn't comment on her abilities. She probably had – she probably found what would be referred to as a false negative.¹⁸

Dr. Murati testified that claimant had objective signs of low back injury, including:

- A. Missing reflexes, weak toe extensor, tender L5 spinous process, straight leg raise at 30 degrees on the left, there's a negative flip exam. All the Waddell's signs were negative, a tender right SI joint – excuse me, left SI joint not the right. The left. And he had some mild atrophy on the left calf which on the fifth and sixth edition would be taken also as evidence of radiculopathy except in the fourth edition they want 2 centimeters. So there was plenty on the low back.¹⁹

Dr. Moeller testified on May 14, 2012. He testified claimant's score for malingering was one of the highest scores he could remember in the four or five years he had been administering the SIMS test. Based on the results, Dr. Moeller testified "[t]he probability that this man is not malingering is minuscule."²⁰ Dr. Moeller stated that his diagnosis of malingering concerned psychological issues and not physiological issues.²¹

Dr. Barrett was deposed on May 16, 2012. She admitted never indicating that claimant was malingering, untruthful or magnifying his symptoms. She never observed any inconsistencies on physical examination. Dr. Barrett testified that based on her May 21, 2010 examination, claimant had no functional impairment using DRE Lumbosacral Category I, which is 0% based on page 110 of the *Guides*.²² She acknowledged not looking at the *Guides* before arriving at claimant's impairment, but testified it was unnecessary to do so based on lack of objective findings and the fact that she had performed hundreds of ratings.²³ She also testified that she did not need to interview claimant using a "History of Spine Complaint" form contained within the *Guides*.²⁴

¹⁸ Murati Depo at 24-25.

¹⁹ *Id.* at 29.

²⁰ Moeller Depo. at 86.

²¹ *Id.* at 43-44.

²² Barrett Depo. at 11, 35.

²³ *Id.* at 33-35, 43-45.

²⁴ *Id.* at 43-44.

Dr. Barrett testified that while her May 21, 2010 report stated claimant had “[n]o significant spasms or tender points throughout the paraspinal with the exception of the bilateral trapezius where the patient notes some increased discomfort,” such statement only meant claimant told her he hurt when she pressed against his trapezius. Dr. Barrett testified that claimant’s complaint of pain does not equate with being an objective finding.²⁵

Dr. Stein testified on June 12, 2012. Dr. Stein testified claimant could have a 0% or 5% rating depending on which table in the *Guides* was used. Dr. Stein testified he would have no argument with any doctor who rated claimant as having a 0% impairment.

Dr. Stein acknowledged that his opinions might have been different, and he may have rated claimant's low back at 0% under DRE Lumbosacral Category I, if Dr. Moeller not only opined claimant was malingering, but also did psychological testing that confirmed malingering.²⁶ Dr. Stein went on to state that if Dr. Moeller found that claimant was clearly malingering, he would place claimant in DRE Lumbosacral Category I. Dr. Stein was shown Dr. Moeller's transcribed testimony and he acknowledged that Dr. Moeller testified that claimant was malingering based on psychological testing. Dr. Stein could not draw a distinction between psychological and physiological malingering.²⁷

After Dr. Stein was shown Dr. Moeller's December 13, 2010 report, he testified as follows:

- A. Let me say something, then you can finish your question. If I had seen this, okay, I would have noted it. Whether I didn't see it because I missed it, I am not perfect either, or it wasn't in the records because sometimes the records that I finally get are so mixed up that I spend time straightening them out, pages do get lost, I can't tell you that. I can only tell you that whether it was my error in missing this page or an error with the page being gone, if I had seen this page that stated that the patient's exit diagnostics were positive for indication of malingering and the rest of this report, I would have put it in my report. And had I put it in my report, I very well might have put the patient in category I.
- Q. You can't say today within a reasonable medical probability having looked at that report you would place Mr. Ross in category I, true?
- A. I think I would have.²⁸

²⁵ *Id.* at 30, 41-42.

²⁶ Stein Depo. at 15-16, 40-41.

²⁷ *Id.* at 31-32, 39, 49-50.

²⁸ *Id.* at 42-43.

. . .

- A. Officially, as a medical basis, under these circumstances with no evidence of injury, with overreporting and, frankly, after the page you showed me of notes, I will accept the responsibility, I am going to say maybe I totally missed that page, but after reading that page by Dr. Moeller, I am not sure that there is a 5 percent impairment either.
- Q. I understand. But you have not had an opportunity to review Dr. Moeller's deposition with respect to his conclusion on malingering in this case, so you can't really state that within a reasonable degree of medical probability; true?
- A. I can only state within a reasonable degree of medical probability based on the information that I had at the moment I make the statement. At the time that I wrote this report, I did not have the information from the 13th of Dr. Moeller, whether it was because it was somehow left out or because I missed it. As I said, I am prepared right now to simply say I screwed up and I missed it, and I appreciate you showing it to me, but it changes my opinion.²⁹

PRINCIPLES OF LAW

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

²⁹ *Id.* at 48.

ANALYSIS

Judge Nodgaard correctly concluded that claimant failed to prove permanent impairment of function and restrictions as a result of his work injury or injuries. The overwhelming majority of the medical evidence supports such finding.

Dr. Estivo and Dr. Barrett assigned 0% ratings under the *Guides*. Dr. Poole indicated claimant had no measurable disability or measurable orthopedic problems. Dr. Stein's report indicated he could have given claimant either a 0% or 5% whole body rating, but he went with a 5% rating. However, Dr. Stein's final opinion, as elicited during his testimony, was that claimant had a 0% impairment. This is the most compelling evidence that claimant had no permanent functional impairment. Given the fact that Dr. Stein seemed to be "on the fence" prior to issuing his report, the Board has no difficulty with Dr. Stein altering his initial 5% whole body rating after being presented with information from Dr. Moeller that claimant was malingering. The fact that Dr. Moeller indicated claimant was malingering from a psychological standpoint does not preclude Dr. Stein from using such information when assessing if claimant had permanent physiological impairment.

Claimant argues that Dr. Stein's initial opinion should be accepted as valid because such physician "carefully reviewed all of the medical evidence provided in a joint letter to him by the parties"³⁰ and concluded that claimant had a 5% whole body impairment. Unfortunately for claimant, the record establishes that Dr. Stein did not carefully review all of Dr. Moeller's records, and when he did, he opted to assign claimant a 0% impairment.

At least in this particular case, the Board does not find particularly credible Dr. Murati's testimony and opinions that claimant has a permanent impairment. Dr. Murati's conclusions are at odds with the majority of the medical opinions.

Claimant has numerous arguments as to why he has permanent impairment or why opinions of doctors saying he does not have an impairment are wrong.

Claimant argues that he has a permanent impairment because he complained of symptoms for over six months, and therefore, his condition is chronic. Longstanding complaints, by themselves, do not prove impairment.³¹

³⁰ Claimant's Submission Brief (filed Sep. 20, 2012) at 3.

³¹ Pages 308 and 309 of the *Guides* list eight characteristics of chronic pain syndrome, including pain of greater than six months duration. No doctor indicated claimant has chronic pain syndrome. Page 80 of the *AMA Guides to the Evaluation of Permanent Impairment*, Third Edition, Revised, contains language that medically documented injury and at least six months of medically documented back or neck pain and rigidity with or without muscle spasm, associated with moderate to severe degenerative changes on structural tests, including unoperated herniated nucleus pulposus, warrants impairment. Such language is not in the version of the *Guides* applicable to this claim.

Claimant also argues that Dr. Estivo's opinions should be disregarded because Dr. Estivo would have continued to provide medical treatment to claimant even though he viewed claimant as a symptom magnifier or malingerer. A physician may provide medical treatment, and give a claimant the benefit of the doubt, as Dr. Estivo did, despite concerns about exaggerated complaints. Dr. Estivo's acknowledgment that he would have continued to provide conservative treatment is not sufficient reason to disregard his testimony.

Claimant argues that Dr. Barrett's opinions should be disregarded because she provided him medical treatment, including medication, even though he had no objective signs of injury. Specifically, "This prescribing of medication was clearly inconsistent with her conclusion in this case that claimant had no permanency of injury or permanent impairment."³² Prescribing medication and permanent impairment are false equivalents.

Claimant argues that ratings from Drs. Estivo and Barrett were not in accordance with the *Guides* and he focuses on two main areas: (1) whether such physicians evaluated claimant's range of motion in estimating impairment; and (2) whether such physicians conducted a thorough history as suggested by the *Guides*.

The *Guides* contain two methodologies to assess spinal impairment: the Injury Model (i.e., the DRE categories) and the Range of Motion Model. Page 94 of the *Guides* indicates the Injury Model should be used if the patient's condition is one listed therein. One of the concerns about using the Range of Motion Model is patient willingness to cooperate when spinal mobility is measured. "If none of the eight categories of the Injury Model is applicable, then the evaluator should use the Range of Motion Model."³³ The *Guides* also state that if a physician cannot decide into which DRE category the patient belongs, the physician "may" use the Range of Motion Model, then place the patient in the DRE category having the impairment percent that is closest to the impairment percent found using the Range of Motion Model.³⁴ The *Guides* further state that a physician should use the Range of Motion Model as a differentiator where the patient cannot be placed into an impairment category under the Injury Model or if a disagreement exists about which of two or three categories to use for the patient.³⁵ "The Range of Motion Model should be used only if the Injury Model is not applicable, or if more clinical data on the spine are needed to categorize the individual's spine impairment."³⁶

³² Claimant's Submission Brief (filed Sep. 20, 2012) at 12.

³³ *Guides* at 95.

³⁴ *Id.* at 99.

³⁵ *Id.* at 101, 109.

³⁶ *Id.* at 112.

Dr. Estivo's and Dr. Barrett's 0% impairment ratings under DRE Lumbosacral Category I were based on the preferred Injury Model. There is no evidence that claimant did not fit under any of the eight categories in the Injury Model. The *Guides* do not mandate or require that a physician use the Range of Motion Model if a different physician has a contrary opinion regarding impairment. Dr. Estivo did not use the Range of Motion Model, but he did not detect any loss of range of motion based on having examined thousands of spines in his career.³⁷ The *Guides* and Kansas law do not state that an impairment rating is invalid if physicians arrive at different ratings and the Range of Motion Model method of assessing impairment is not used as a differentiator.

Claimant also argues that Drs. Estivo and Barrett did not conduct a patient history as outlined by the *Guides*. Page 94 of the *Guides* states that each evaluation "should include a complete, accurate medical history and a review of all pertinent records, a careful and thorough physical examination, a complete description of the patient's current symptoms and their relationship to daily activities, and all findings of relevant laboratory, radiologic, and ancillary tests." Page 95 of the *Guides* states, "Guided by the history (Fig. 61, p. 96), the physician should focus attention on spine-related physical findings, such as motor abilities, reflexes, muscle atrophy, anal tone, and the need for assistive devices." Figure 61 contains five areas of questions that the physician may ask the patient relative to spine complaints, including queries regarding the history or injury or impairment, a section regarding present symptoms, including whether the condition interferes with activities of daily living, the patient's perceptions about his or her ability to sit, stand, walk or lift, and a section documenting the patient's perception as to why the impairment evaluation is taking place.

Dr. Estivo did not ask claimant about activities of daily living or how he perceived his physical abilities, largely because claimant had a normal physical examination and minimal complaints.³⁸ Dr. Barrett did not ask claimant these questions, and also did not ask about his exercises or postures, because claimant had no objective findings, just subjective complaints.³⁹ The Board notes that there is nothing in Kansas law or the *Guides* indicating that an impairment rating is invalid if a physician providing the impairment rating opts to not ask a claimant questions in Figure 61. Such questions are not even necessitated under the *Guides*. Most of the questions posed in Figure 61 of the *Guides* might be relevant to a physician assigning restrictions, but do not seem particularly helpful when determining impairment. A back or neck impairment under the *Guides* is not based on whether a worker perceives his or her pain to be excessive or believes he or she cannot perform job duties or engage in recreational activities.

³⁷ Estivo Depo. at 53.

³⁸ *Id.* at 52, 54.

³⁹ Barrett Depo. at 44-45.

Claimant equates not following the *Guides'* suggestions on how to obtain a patient history as somehow negating the validity of a doctor's rating. The Board rejects claimant's argument.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds that Special Administrative Law Judge John C. Nodgaard's Award should be affirmed.

AWARD

WHEREFORE, the Board affirms Special Administrative Law Judge John C. Nodgaard's February 22, 2013 Award.

IT IS SO ORDERED.

Dated this _____ day of July, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Nelsonna Potts Barnes, Administrative Law Judge

Honorable John C. Nodgaard, Special Administrative Law Judge